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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 209

KEITH M. BEATY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 27-45; R. IV 3-21)[1] is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 14, 1954 (Pet. 45-46; R. IV 23), and the petition for a writ of certiorari was filed on July 12,

[1] The printed record consists of four volumes, references to which will be designated "R. I" to "R. IV", respectively. References to the original transcript, of which there are eight volumes, will be designated "Tr."

1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Was petitioner prejudiced by the court's warning to the jury at the outset of the trial that their conduct might be under official observation?

2. a. Were the charts used to illustrate the testimony based upon evidence adduced at the trial?

b. Where the Government relied mainly on proof by direct evidence of specific items of unreported income, was it proper to introduce a computation of expenditures as corroboration?

c. Was petitioner entitled to a specifically requested instruction on the nature of circumstantial evidence?

3. Was prosecution properly brought in the Western District of North Carolina although petitioner's income tax returns were filed in the Middle District?

4. Was the prosecution properly authorized by the Attorney General, or did petitioner have cause to complain if it was not?

5. Did the trial court commit reversible error in telling the foreman of the jury, in open court but in the absence of the other members, that a recommendation of mercy would be proper and would be honored?

6. Did the fact that the jury was present during the objections to the court's charge deprive petitioner of a fair trial?

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7. Did the fact that the trial court, prior to the closing arguments, had agreed to give some instruction on circumstantial evidence, but then refused to so charge, deprive petitioner of a fair trial?

STATUTE AND OTHER AUTHORITIES INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

* * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

(26 U. S. C. 145.)

SEC. 3740. AUTHORIZATION TO COMMENCE SUIT.

No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commssioner authorizes or sanc-

tions the proceedings and the Attorney General directs that the suit be commenced.

(26 U. S. C. 3740.)

Executive Order No. 6166, promulgated June 10, 1933 (5 U. S. C. 124-132):

> Sec. 5. The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.
>
> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.
>
> For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.
>
> Nothing in this section shall be construed to

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affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On March 4, 1952, a three-count indictment was returned against petitioner in the United States District Court for the Western District of North Carolina charging him with wilful attempts to de-

feat and evade his income taxes for the years 1945, 1946 and 1947, in violation of Section 145(b) of the Internal Revenue Code.[2] (R. I 1-4.) The acts of attempted evasion alleged were the maintenance of false books and records, the concealment of assets and sources of income, and the filing of fraudulent income tax returns. The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Corrected	Tax
Count I (1945).....	$48,490.98	$24,350.55	$254,701.83	$209,785.06
Count II (1946).....	75,265.42	42,526.74	174,715.24	125,565.03
Count III (1947)....	48,283.69	22,937.04	86,077.04	50,960.08

After a jury trial lasting approximately three weeks petitioner was found guilty as charged (R. I 491, 535-537), and was ultimately sentenced to imprisonment for two years and fined $20,000 (R. I. 551-552).

The evidence to support the verdict may briefly be summarized as follows:

Petitioner derived income from several sources during the years involved in this case. (R. I 17-18.) One of these was the Beaty Service Company, Inc., which rented and bonded taxicabs operating in Charlotte, North Carolina. (R. I 17.) Petitioner was its president and was in complete con-

[2] A second indictment, filed the same day, charged petitioner with similar attempts to evade the income taxes of the Beaty Service Company, Inc., of which he was president. (R. I 13-16.) The Government elected to proceed on the first indictment in the present proceeding. (R. I 17; R. II 7.)

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trol. (R. I 148, 150, 152, 332; R. II 11, 31, 86-87, 156, 164.)

Drivers who rented cabs from the corporation paid $10 or $12 a day. Individual cab owners who were bonded by the corporation paid $7 weekly. (R. I. 24-25.) Both rental and bonding fees were accepted by an attendant at the headquarters of the taxicab fleet. The attendant recorded them on a daily check sheet, placed the money in an envelope, and dropped the envelope through a slot in the top of a safe. The attendant did not have access to the safe and the contents were removed by petitioner or one of his relatives and taken to petitioner's office. (R. I 26-27, 97-103; R. II 12, 32, 34-36, 46-48.) Petitioner took charge of the money and made the bank deposits, and the deposit slip was then given to the bookkeeper as a basis for entering the receipts in the corporation books. (R. II 29-32, 153-155, 161.) In addition to making the deposits, petitioner at times brought in as much as $900 in small bills and exchanged them for large ones but did not deposit this money. The banks were required by the Federal Reserve system to report such currency exchanges only if the amount exceeded $1,000.[3] (R. II 22-28.)

Since the books simply recorded the total of the deposits,[4] the examining revenue agents asked peti-

[3] In several instances petitioner borrowed amounts from $20,000 to $50,000 from a bank and deposited an equal amount of cash with the bank as collateral. (R. I 125-130; R. II 96-98.)

[4] Petitioner had been advised by his bookkeepers to keep a more detailed record of receipts. (R. I 114; R. II 163.)

tioner for the daily check sheets on which the payments of the individual drivers had been recorded. Petitioner said he would try to get them but a few days later told the agents that they had been destroyed.[5] (R. II 13, 103, 118-120.) Accordingly, in order to determine what the receipts had been, the agents interviewed over one hundred drivers who had paid either rental or bonding fees during 1945, 1946 and 1947, and examined records of the Charlotte police department which contained personnel records of the drivers and semi-monthly reports filed by petitioner indicating the number of cabs and the names of the drivers operating under the corporation's rental and bonding system.[6] (R. I 19-21, 142-143; R. II 17-20, 54-56.) Whenever there was evidence that a driver, whose name was reported by petitioner in the semi-monthly reports, was actually not operating a cab for a period of time, the agents charged no income to the corporation for that period. (R. I 175, 179-180.) The investigation also uncovered numerous instances in which the corporation, acting through petitioner, had sold used cars and had failed to report the full purchase price. (R. II 61-70, 121-137.) Upon the basis of all this evidence the agents calculated that during the years 1945, 1946 and 1947 the corpora-

[5] The envelopes had also been destroyed. (R. I 406.) Records of expenditures, on the other hand, had been preserved. (R. I 400; R. II 160-161.)

[6] About seventy-five of the drivers testified for the Government at the trial (R. I 43-55, 68-111, 413; R. II 32-52, 72-77) and petitioner's semi-monthly reports and other evidence indicated the names of many others (R. I 414-457).

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tion had received the following additional amounts of income, over and above those reported in the corporate return—$55,103.29, $32,461.97, and $21,696.85. (R. II 145-150.) Since the corporation was controlled by petitioner, since its books and records did not record these receipts, and since the receipts in general had been shown to reach petitioner for deposit, the Government attributed this additional income to him. (R. I 148-152.)

The Lancaster Distributing Company, which did a wholesale whiskey business, was set up as a sole proprietorship of E. C. Pundt, but there was much evidence from which it could be concluded that petitioner was the actual owner. (R. I 33-34, 112-125; R. II 52-53, 81-85, 88-95.) Pundt paid income taxes. (R. I 33.) If petitioner had reported this income his tax would have been determined at a much higher rate, and by having Pundt report it he saved $13,142.09 in 1945 and $13,830.72 in 1946. (R. II 113-115.)

Upon the basis of evidence of the above and other sources of income, the Government computed that petitioner had failed to report taxable income in the following amounts (R. I 34-41; R. II 145-152):

1945	$142,402.94
1946	80,328.17
1947	21,161.12

In partial substantiation of the above computation (R. I 152) the Government adduced proof to show that petitioner's expenditures for the years

1945 and 1946 were considerably in excess of his known resources. The excess was $32,855.60 in the first year and $56,695.67 in the second. (R. II 106-112.) Petitioner sought to show that this could be accounted for by the use of cash which he had previously deposited with banks as collateral on loans, but Cline, the revenue agent who prepared the expenditures computation, testified that, while petitioner did have cash on hand at the beginning of 1945, he did not use it for any of the expenditures included in the Government's computation.[7] (R. II 116-117.)

ARGUMENT

1. Apprehensive at the outset of the trial that an attempt might be made to tamper with the jury, the judge instructed them at considerable length on the importance of their duties and the necessity of avoiding any discussion of the case with others. (Tr. IV 50-57.) He told the jurors that, although under the circumstances he could hold them together under surveillance of court officials for the duration of what promised to be a long trial, he would not keep them away from their families but would trust to their good sense to obey his instructions. (Tr. IV 51-52.) And in the course of instructing them to repel all outside attempts to influ-

[7] Petitioner asserts (Pet. 13) that, as of January 1, 1945, he had $100,000 thus on deposit in banks to secure loans. As we read the record the amount on deposit at that time was only $50,000. (R. I 126-130, 153-154.) Although other sums had been deposited to secure loans of the Lancaster Distributing Company these were apparently not released until the affairs of that concern were wound up in 1947. (R. I 124; R. II 16.)

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ence them he remarked that they might be watched by some agency whose duty it was to see that a fair verdict was rendered. (Pet. 49-50; Tr. IV 53-54.) There was no objection, but petitioner now complains (Pet. 2, 11) that this was prejudicial error.

There is no merit in the argument. There was no actual contact by an outside agency as there appeared to have been in *Remmer* v. *United States*, 347 U. S. 227. All jurors must realize that they are constantly under the surveillance of court officials, at least in the court house, while a trial is in progress. Certainly the court's warning was less prejudicial to the petitioner than locking up the jury would have been, but that step would clearly have been within the court's discretion. We submit that the Court of Appeals was correct in holding (Pet. 44) that the warning was proper.

2. Petitioner urges (Pet. 2-3, 12-16) that the opinion of the court below presents several of the same issues raised by the group of so-called "net worth" cases[8] in which this Court granted certiorari on June 7, 1954 (347 U. S. 1006, 1008, 1010). He implies that the Government's proof of unreported income was mainly based upon Agent Cline's computation showing expenditures in excess of known resources, and he argues that the

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[8] *Friedberg* v. *United States*, No. 18; *United States* v. *Calderon*, No. 25; *Holland* v. *United States*, No. 37; *Smith* v. *United States*, No. 52. In all of these cases the Government was forced to rely mainly upon proof of unexplained increases in annual net worth in order to show unreported taxable income.

Government's proof was circumstantial, that the charts used by the agents to illustrate their computations were not based on the evidence, and that the trial court should have given a specific instruction on the nature of circumstantial evidence. We submit that the issues presented by the "net worth" cases now pending before this Court are not raised by the record in this case. Here, the Government proved specific items of unreported income and its proof was largely direct rather than circumstantial.

a. The backbone of the Government's case was the testimony of the taxi drivers and the semi-monthly reports submitted to the City of Charlotte by petitioner showing the number of cabs and the names of the drivers operating under the corporation's rental and bonding system. Upon the basis of this direct evidence Agent Parrish submitted a computation, illustrated by charts, showing the amounts of unreported rental and bonding fees received by the corporation. The use of such charts is, of course, well recognized. *United States* v. *Johnson*, 319 U. S. 503, 519; *Gendelman* v. *United States*, 191 F. 2d 993, 995-996 (C. A. 9th), certiorari denied, 342 U. S. 909. But petitioner complains (Pet. 8, 12) that Parrish prepared his charts before trial, that he was allowed to place them before the jury at the beginning of the trial, and that they were, therefore, not based upon the evidence in the case.

It is true that the charts were prepared prior to

trial and were shown to the jury at an early stage. (R. I 34, 184.) But Parrish had already given a general description of his examination of numerous records and he had testified that the charts represented the results of his own investigation. (R. I 17-34; R. II 7-16.) The defense waived cross-examination at that time (R. I 42), and Parrish was succeeded on the stand by approximately seventy-five taxi drivers (R. I 413) and numerous other witnesses. Thereafter, Parrish returned to the stand, repeated his computation of petitioner's unreported income with some minor corrections necessitated by the testimony of the witnesses (R. I 142-144; R. II 118-153), and then was subjected to a long and searching cross-examination (R. I 144-340). He testified repeatedly that the charts represented information obtained from petitioner's books and records and the evidence presented at the trial, although he admitted that a few small corrections were necessary. (R. I 143-144, 166-167, 170-171, 179-180, 184-185, 211-212, 214, 215-217, 225, 226-227, 229-230, 270-271, 307-308, 336.) We think it clear that Parrish's charts and computations were adequately supported by the evidence.

b. Petitioner implies that the Government relied heavily upon the expenditures computation of Agent Cline to establish unreported income, and he argues (Pet. 7, 13-15) that this computation was faulty because it failed to take into consideration the alleged $100,000 cash which petitioner had on deposit as collateral for bank loans at the starting

point, January 1, 1945. But, as we have shown (*supra*, pp. 7-10), the Government's case was based upon specific items of unreported income, and Cline's expenditure computation was used only as partial corroboration. In his charge to the jury the trial judge gave a rather lengthy summary of the Government's contentions (R. I 505-510, 519-521), as well as those of the defense, but he did not even mention the expenditures computation. And he told the jury, in partial compliance with a defense request, that any cash which petitioner had on hand as of January 1, 1945, would not constitute income for the years involved in this case. (R. I 480, 528-529.) Consequently, the expenditures computation was a collateral matter of relatively minor importance, even if it were incomplete, and the jury would have been required under the court's instruction to disregard it in so far as they believed that the unexplained expenditures could have come from cash on hand as of January 1, 1945.

Furthermore, Cline testified that, although petitioner did have cash at the starting point, none of this cash could have been used for the particular expenditures which he included in the computation (R. II 117), and Parrish stated flatly that it would not upset the computation (R. I 157). The year 1947, the last of the three years involved in the indictment, was not even included in Cline's calculations. According to him petitioner had unexplained expenditures amounting to over $89,000 in 1945 and 1946 (R. II 112), and the $50,000

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which he had on deposit as collateral at the beginning of 1945 [9] would provide no satisfactory explanation even if the jury disbelieved Cline's testimony that none of the expenditures came from this cash.

The Government's proof of the specific items of unreported income was clearly sufficient to establish a *prima facie* case, and the expenditures computation was an added relevant circumstance to which the jury could give such weight as it saw fit.

c. Assuming that the Government's proof was entirely circumstantial, petitioner contends (Pet. 3, 15-16) that the trial court should have given a specifically requested instruction on the nature of circumstantial evidence over and above the usual charge on reasonable doubt. The question of the right of a defendant to have the jury instructed in this manner arises where the Government, as in the so-called "net worth" cases, is forced to rely upon an indirect method in proving unreported income.[10] It does not arise here, for, as the opinion of the Court of Appeals points out (Pet. 43), the evidence for the Government was largely direct. The Government proved by direct evidence (*supra*, pp. 6-9) that petitioner dominated the corpora-

[9] The amount thus available to explain expenditures during 1945 and 1946 was only $50,000, instead of $100,000 as petitioner asserts. See footnote 7, *supra*, p. 10.

[10] See *Holland* v. *United States*, *supra*; and *McFee* v. *United States*, No. 15, certiorari denied March 15, 1954 (347 U. S. 927, order vacated and case restored to the docket June 7, 1954 (347 U. S. 1007).

tion, that the corporation received numerous rental and bonding fees which were not recorded on its books, and that all the rental and bonding fees found their way into petitioner's hands. And the Government proved by direct evidence that petitioner was the actual owner of the Lancaster Distributing Company. (R. II 52-53, 81-85.) It is undisputed that it is not error to refuse to instruct the jury on circumstantial evidence where the proof is, at least in part, direct. *Campbell* v. *United States*, 47 F. 2d 70, 71 (C. A. 5th); *Herman* v. *United States*, 48 F. 2d 479, 480 (C. A. 5th); *Sloan* v. *United States*, 31 F. 2d 902, 906 (C. A. 8th); *Portman* v. *United States*, 34 F. 2d 406, 408 (C. A. 8th); *Carnahan* v. *United States*, 35 F. 2d 96, 104 (C. A. 8th), certiorari denied, 281 U. S. 723; *Sullivan* v. *United States*, 32 F. 2d 992, 994 (C. A. 9th); *McMillan* v. *United States*, 27 F. 2d 94, 96 (C. A. 8th); Randall, Instructions to Juries, Sections 226-227; Branson, Instructions to Juries (3rd ed., 1936), Section 65.

3. Petitioner's residence and principal place of business were at Charlotte in the Western District of North Carolina. He was required to file his income tax returns, however, at Greensboro, which is located in the Middle District. He was indicted and tried in the Western District, and now he contends (Pet. 3, 17-20) that he should have been tried in the Middle District.

The underlying assumption of the argument is that the offense alleged in the indictment was the filing of a false return. But the essence of the offense prescribed by Section 145(b) of the Inter-

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nal Revenue Code (*supra*, p. 3) is a wilful attempt to defeat and evade income taxes, and such an attempt obviously may require the performance of many acts in addition to the ultimate filing of the fraudulent return. *Spies* v. *United States*, 317 U. S. 492, 498-499. Such additional acts were alleged in the indictment in this case (*supra*, p. 6) and the proof showed that almost all of petitioner's pertinent actions had occured within the jurisdiction of the District Court for the Western District. Moreover, the trial of the defendant at his home was consistent with the opinion of this Court in *United States* v. *Johnson*, 323 U. S. 273, where this Court held that a law should be construed to permit the trial of a defendant in his vicinage if possible. Cf. *United States* v. *Wilson*, 344 U. S. 923.

4. Prior to trial petitioner filed a motion to dismiss the indictment on the ground that the case had not been presented to the grand jury pursuant to the direction of the Attorney General. It was contended that prosecution for violation of the revenue laws must be initiated by the Attorney General, under the requirements of Section 3740 of the Internal Revenue Code (*supra*, pp. 3-4), Section 5 of Executive Order 6166 (*supra*, pp. 4-5), and Circular Letter No. 2431 issued by the Attorney General on August 10, 1933.[11] (R. I 4-7.) The

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[11] The pertinent portion of Circular Letter No. 2431 is as follows:

> In accordance [with Section 5 of Executive Order 6166], all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue

motion was denied. (R. I 12.) Although the point was not raised in the Court of Appeals, it is now stated (Pet. 3-4, 21) as one of the grounds for allowance of the writ.

A similar contention has been raised in *Sullivan* v. *United States*, No. 64, certiorari granted, 347 U. S. 1010, June 7, 1954. As we pointed out in our brief in opposition to the petition in that case,[12] we believe that the grand jury has plenary power to investigate and return indictments on all criminal matters within the jurisdiction. In our view Section 3740 of the Internal Revenue Code has no application to criminal cases, and Executive Order 6166 and Circular Letter 2431 simply concern the internal functioning of the Department of Justice and confer no rights upon defendants. Moreover, the present case is sharply distinguished from *Sullivan*, for there is no dispute that here the Attorney General directed the United States Attorney to call a special grand jury to inquire into probable violations of federal law, that he directed the United States Attorney to cooperate with the grand jury to the fullest extent, and that the indictment of petitioner was prepared at the specific direction of the grand jury. (R. I 8; R. II 1-4, 6-7.) Since the Attorney General had given the United States Attorney a general authorization to cooperate with the

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laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted.

[12] No. 747, October Term, 1953.

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grand jury we think petitioner's point has no merit. However, because of its relation to the contention in the *Sullivan* case this court may wish to withhold action on the present petition pending a decision on *Sullivan*.

5. During the jury's deliberations the foreman returned to the court room alone and asked the trial judge, in open court, whether a recommendation could be made because of petitioner's health. The judge replied (R. I 534):

> A recommendation is always proper to be made by the jury, and if made by the jury as part of their verdict returned will be adhered to by the Court.

Defense counsel raised no objection to this proceeding.

Ultimately the jury returned with a written verdict which, after finding petitioner guilty as charged, continued as follows (R. I 535-536, 537, 546-547):

> Recommend that the Court take into consideration the health condition of Mr. Beaty; therefore, we recommend mercy.

Thereafter the jury was polled upon request by the defense and found to be unanimous. (R. I 535-537.)

Defense counsel filed a long motion for new trial assigning thirty-eight alleged errors. (R. I 538-543.) One of these (No. 8) charged that the court erred in conferring with the foreman in the absence

of the rest of the jury, another (No. 29) charged that the verdict was the result of a bargain, but no point was made of the fact that the court had promised the jury to abide by their recommendation. After the motion had been disposed of, the trial judge indicated that he felt bound, in view of the jury's recommendation, to appoint two physicians to examine petitioner, and, with the acquiescence and apparently the cooperation of defense counsel, this was done. (R. I 544-550.) The physician reported that petitioner was normal and in good condition, and sentence was then imposed. (R. I 550-554.)

Petitioner now contends (Pet. 4, 21-22) that the trial court erred in instructing the foreman in the absence of the other jurors, and that the verdict was the result of a trade or compromise. But there is nothing in the record to indicate that the jury returned a compromise verdict. And, as the opinion of the court below points out (Pet. 44-45), the communication of the court to the foreman alone was manifestly not prejudicial, since it is clear from the jury's written verdict that the foreman transmitted the court's instructions accurately. Petitioner had it within his power to insist that all the jurors be present in the court room. The irregularity, if any, was waived by the failure to object at the proper time. See Rule 30, Federal Rules of Criminal Procedure, *supra*, p. 5.

It is also urged that the court should not have promised to follow the jury's recommendation. But petitioner, instead of objecting to the court's statement, remained silent on the subject just as long as

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it appeared that he stood to reap some benefit therefrom. He did not object when the statement was made; he did not object when the verdict was returned; he did not raise the point in the motion for a new trial; and he readily cooperated in the physical examination. Only after it appeared that there was no health problem to be considered did he raise the point on appeal. It appears likely that defense counsel, far from considering the court's promise erroneous, actually welcomed it when given. On the other hand, if counsel thought it a mistake on the court's part, and hoped to sow error in the record by failing to make timely objections, they are now faced with the prohibition of Rule 30. As the Court of Appeals for the Seventh Circuit said recently in *United States* v. *Furlong,* 194 F. 2d 1, 3, certiorari denied, 343 U. S. 950:

> [Rule 30] is intended to prevent a litigant from taking advantage, after verdict, of the giving of an erroneous instruction to which he failed to call attention in time to afford the court an opportunity to correct it.

See also *Wyche* v. *United States,* 193 F. 2d 703, 705 (C.A.D.C.), certiorari denied, 342 U. S. 943; *Villaroman* v. *United States,* 184 F. 2d 261, 262-263 (C.A.D.C.); *Jackson* v. *United States,* 179 F. 2d 842 (C.A. 2d), certiorari denied, 339 U. S. 981; *Cave* v. *United States,* 159 F. 2d 464, 469 (C.A. 8th), certiorari denied, 331 U. S. 847. The case is clearly distinguishable from *Demetree* v. *United States,* 207 F. 2d 892, 895 (C.A. 5th), in which the jury, after informing the trial judge that they were

deadlocked, received assurance that the punishment would be lenient. The "plain error" rule may not be invoked under such circumstances as those presented by the present record. See *Ryan* v. *United States*, 99 F. 2d 864, 865 (C.A. 8th), certiorari denied, 306 U. S. 635, and *Goldstein* v. *United States*, 73 F. 2d 804, 806-807 (C.A. 9th); and cf. *United States* v. *Parker*, 103 F. 2d 857, 862-863 (C.A. 3d), certiorari denied, 307 U. S. 642.

6. Petitioner urges (Pet. 4, 16, 22-23) that the trial court erred in not excluding the jury at the conclusion of the charge. Rule 30 requires that an opportunity be given to make objections out of the hearing of the jury, but in this case defense counsel launched upon his objections without approaching the bench or requesting that the jury be excluded. Petitioner suffered no detriment from what transpired. Although complaint is made that defense counsel were characterized by the judge as "zealous", it is clear that this remark was meant to apply to the attorneys for the prosecution as well. (R. I 530-531.) The Court of Appeals correctly held (Pet. 43) that petitioner was not prejudiced.

7. Petitioner requested a special instruction on the nature of circumstantial evidence, a request which the court, prior to the closing address by defense counsel, indicated it would grant with some modifications. (R. I 478, 488-489.) The instruction was not given, however, and the court, in reply to petitioner's objection, stated in effect that this was not a circumstantial evidence case. (R. I 530). Petitioner complains (Pet. 4, 15, 16, 24) that his argument to the jury was nullified.

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The contention is without merit. There is no way to determine whether the closing argument for the defense was nullified since it has not been included in the record. But certainly, if this had been the case, counsel would not have been content with the mild objection he registered at the conclusion of the charge. (R. I 530.) Furthermore, as we have shown above (*supra*, pp. 15-16), petitioner was not entitled to anything more than the usual instruction on reasonable doubt and the trial court was correct in ultimately rejecting the requested charge.

CONCLUSION

We believe that the decision below is correct and that no question calling for review is presented. It is respectfully suggested that the petition be denied unless the Court desires to hold it in abeyance pending decision in the *Sullivan* case in view of the somewhat similar issue involved in the two cases.

SIMON E. SOBELOFF,
Solicitor General,

H. BRIAN HOLLAND,
Assistant Attorney General,

ELLIS N. SLACK,
DAVID L. LUCE,
JOSEPH M. HOWARD,
Special Assistants to the Attorney General.

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